IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE A.K.BASHEER
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 12TH DECEMBER 2007 / 21ST AGRAHAYANA 1929

WA.No. 476 of 2007

AGAINST THE JUDGEMENT IN WPC.10555/2006
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APPELLANTS/RESPONDENTS 1 TO 3 IN WPC
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1. STATE OF KERALA, REPRESENTED BY
THE PRINCIPAL SECRETARY TO GOVERNMENT
FINANCE DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

2. DISTRICT MEDICAL OFFICER, PALAKKAD.

3. ACCOUNTANT GENERAL (KERALA), TRICHUR.

BY SPL. GOVERNMENT PLEADER SRI. N. MANOJ KUMAR

RESPONDENTS:

V.J. PHILOMINA, W/O.N.V. CHACKO,
RESIDING AT NANGALIL HOUSE,
NEAR THS, CHITTUR P.O., PALAKKAD DISTRICT,
(HEAD NURSE, GOVT.HOSPITAL, CHITTUR,
PALAKKAD.)

BY ADV. SRI.KODOTH SREEDHARAN
ADV. SRI.ELVIN PETER.P.J.(AMICUS CURIAE)

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 12/12/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY, A.K.BASHEER & K.P.BALACHANDRAN, JJ.

W.A.NO.476 OF 2007 (C)

Dated this the 12th day of December, 2007

J U D G M E N T

KOSHY,J.

The issue to be decided in this case is whether the prior military service can be reckoned by the employee for claiming time bound grade promotions. There is no dispute that in view of the Government orders, for reckoning 10 years of service for granting first grade promotions, prior military service has to be taken into account. A Division Bench of this Court in ***State of Kerala v. Sreedharan (2004 (1) KLT 398)*** considered various Government orders and held that since for granting first grade promotion, prior military service is counted, it should be continued to be counted while granting the second and third grade promotions also. In W.P.(C).No.10555/2006, the learned Single Judge of this Court opined that observations of the Division Bench in Sreedharan's case (supra) appears to be

not correct. But since Single Judge is bound by the Division Bench decision, learned Judge followed the above dicta and quashed the impugned orders (Exts.P5 & P7). When the State filed writ appeal, a Division Bench of this Court found that learned Single Judge has expressed cogent reasons for differing from the views expressed by the Division Bench in Sreedharan's case and the question was referred to be decided by the Full Bench. Since the issue may affect large number of employees, we issued notice to Bar association so that interested members of the Bar can address the Court. We have also appointed Mr.Elvin Peter P.J., Advocate as Amicus Curiae. Special Government Pleader Sri.N.Manoj Kumar and Amicus Curiae Mr.Elvin Peter placed all relevant Government orders in the Court. Counsel for the respondent Sri.Kodoth Sreedharan also placed all the relevant papers. We record our appreciation to all the above advocates.

2. Time bound grade promotions are given to avoid stagnation and discontentment among employees who do not

get any promotion even after putting in long years of service. Even though not entitled to as per rules or on the terms of appointment order, as a matter of concession, Government decided to grant grade promotions to their employees who were not granted any promotion after entering in the Government service despite their long service. Such benefits were granted by issuing Government orders as authorised by Statute. In G.O.(Ms.)439/79/GAD. dated 1st August, 1979, the Government ordered grant of benefit of higher grade promotion on completion of 13 years of service in the entry grade to the Non-gazetted officers. The operative portion of the order is as follows:

> "Government are pleased to order that all the Non-Gazetted Officers who remain in the entry grade without a promotion in the normal course shall be allowed the benefit of a higher grade on completion of 13 years of service in the entry grade. This order will take effect from 1.7.1979."

It was also stated in the above order that detailed instructions

will be issued subsequently. It was clarified by G.O.(P). 1041/79/(142)/Fin. Dated 27.11.1979 that the term 'entry grade' shall be defined as the grade for category of post to which an employee is initially appointed in Government service by direct recruitment by competent authority. It was also stated that the provisional service can be reckoned as qualifying service subject to the restrictions mentioned in Government decision No.2 under Rule 33 of KSR Part I. By Government order G.O.(P)764/81/(384)/Fin. dated 16th November, 1981, Government decided to add military service which counts for civil pension while completing 13 years of service for grant of benefit of the higher grade for Non-Gazetted officers. The relevant portion is as follows:

> "Government have considered the proposal in detail and are pleased to order that War/Military Service which counts for civil pension will also be reckoned for computing the 13 years qualifying service for the grant of the benefit of higher grade in respect of Non-Gazetted Officers. Civilian Service under military will not, however, count for higher grade."

By Government order G.O.(P)515/85/Fin. dated 16th September 1985, it was decided by the Government to grant higher grade promotion on completion of 10 years of service and for a second higher grade promotion after either 10 years of service in the first higher grade or a total service of 20 years in the two grades together, which ever is earlier. The relevant clause 10 (i) reads as follows:

> "(i). Employees in the revised scales of pay ranging from Rs.550-800/- to Rs.1150-2270/- will be allowed promotion to higher grade on completion of 10 years of service and a second higher grade after either 10 years of service in the first higher grade or a total service of 20 years in the two grades together, whichever is earlier."

3. By Government order G.O.(P)132/91/(98)/Fin. dated 21.2.1991 Government decided to extend the above said benefit of reckoning military service to category of Gazetted officers also for the 10 year time bound grade promotions. The above Government orders only mention that benefit of military service can be reckoned as qualifying service for the 10 years

bound grade promotions (the first higher grade) and not thereafter. The Government orders were silent on the question whether for granting subsequent grade promotions on completion of 20 – 25 year's service, the prior military service can be counted or not. In the absence of counting of such benefit normally it cannot be granted. By circular No.54/92/(138)/Fin. dated 6th November 1992, Government issued general guidelines for sanctioning time bound higher grades. In the above, with regard to military service it was shown as follows:

> "(xiv) War/Military service which counts for Civil Pension will be reckoned for computing the qualifying service for the grant of higher grade, Civilian Service under military will not, however, count for higher grade. [G.O.(P)764/81/(384)/Fin. dated 21.2.1991]"

Thereafter Government further issued a pay revision order G.O.(P)930/93/(2)/Fin. dated 8th December, 1993 wherein it is clearly stated as follows:

> "(iv). War/Military Service which counts for Civil Pension will be reckoned for computing the qualifying service <u>for the grant of first higher grade.</u> Civilian Service under military will not however, count for higher grade."

So it is very clearly stated that the qualifying military service will be counted only for the first higher grade which implies that for subsequent higher grade promotions it may not be applicable. But in the circular dated 6th November 1992 Government did not specifically state that it is applicable only for one grade promotion. Hence several employees made claim. Thereafter a clarification was issued by the Government vide circular dated 14th February, 1996 which is as follows:

> '(i) In the case of Non-Gazetted Officers, War/Military Service which counts for civil pension will be reckoned for sanctioning 13/10, 20 and 25 years higher grade for the period from 1.7.1979 to 29.2.1992.
>
> (ii) In the case of Gazetted Officers, War/Military service which counts for civil pension will be reckoned for only one higher grade with effect from 1.7.1988.
>
> (iii) With effect from 1.3.1992, War/Military

> Service which counts for civil pension will be reckoned for higher grade once.'

So any doubt regarding the above was clarified by the Government. But at paragraph 4 of the circular the Government also stated that appointment by transfer are treated as equal to direct recruitment and that was challenged and it was set aside by judgment dated 12.12.2001. According to the learned Judge, clarification in Ext.P4 was against the Government orders and no circular can be passed explaining the Government order against the order itself and it can be done only by issuing another Government Order. But the clarification regarding counting of military service was not set aside. But by way of caution another Government Order G.O.(P).622/.3/Fin. dated 26th November, 2003 was issued. In that order at paragraph 3 it is stated regarding the counting of military service. Paragraph 3 reads as follows:

> "3. As per para 2 (XIV) of the Circular

Second read above War/Military Service counts for civil pension would reckoned as qualifying service for granting higher grade to non-gazetted officers and gazetted officers with effect from 1.7.1979 and 1.7.1988 respectively. It has been ordered in Par 4 (VI) of the Government Order reads as third paper above that War/Military service which counts for civil pension would be reckoned for computing the qualifying service for the grant of first higher grade. Civilian service under Military will not, however, count for higher grade. Government be pleased to issue further clarifications to the above clause as follows:

(i) In the case of non-gazetted officers, War/Military service which counts for civil pension will be reckoned for sanctioning 13/10, 20 and 25 years higher grade for the period from 1.7.1979 to 29.2.1992.

(ii) In the case of Gazetted officers, War/Military service which counts for civil pension will be reckoned for only one higher grade with effect from 1.7.1988.

(iii) With effect from 1.3.1992, War/Military service which counts for civil pension will be reckoned for one higher

> grade only in respect of non-gazetted and gazetted officers."

In Sreedharan's case (supra), 1991 Government Orders and Circulars/Clarifications issued by the Government in 1996 and 2003 were not brought out. Sreedharan's case was also followed by another Division Bench in W.A.No.2145/2003. In it also 1991 Government orders, 1996 circulars and 2003 Government Orders etc. were not brought out. If the Government Orders were brought to the notice of the court, decision would have been otherwise. After considering those Government Orders, the learned Single Judge in the impugned order observed as follows:

> "It is contended that the military service is reckonable not only for computing the period required for the grant of the first higher grade but also for the second and third higher grades and that the objection raised by the Accountant General and endorsed by the 1st respondent run counter to the ruling of the Division Bench of this Court in State of ***Kerala v. Sreedharan (2004 (1) KLT 398)***. While the learned counsel for the petitioner places reliance on the above decision, the learned Government Pleader has taken up

the contention that the statement of law made in the above decision is not correct and the same requires reconsideration.

As per the scheme formulated by the Government for the grant of the time bound higher grades, the employees are eligible to get the first higher grade promotion in the entry grade on completion of 10 years of service, the second higher grade on completion of either 10 years of service in the first promoted post or a total service of 20 years in the entry post and the first regular promotion/time bound higher grade together and finally the third higher grade on completion of a total service of 25 years. Ordinarily, the service rendered in the government departments alone need be taken into account for the purpose of computing the requisite length of service for granting higher grades.

Right to enjoy the benefit of higher grade is traceable to the government orders on the subject and decors such government orders, no employee can enjoy that benefit. Time bound higher grade is not a condition of service guaranteed by the statutory rules, but a concession intended to lessen the severity of stagnation for want of regular promotion. The completion of the requisite length of service, i.e., 10 years, 20 years and 25 years for the grant of the first, the second and the third higher grades respectively is a must.

In the case of those who had rendered war/military service which counts for civil pension, the period covered by such service can be reckoned while computing the minimum

> period required for the grant of the higher grade. This benefit was granted as per Circular No.54/92/(138)/Fin. dated 6.11.1992 which is referred to as the first paper in Ext.P4 order. As per para.2 (XIV) of the above Circular, war/military service which counts for civil pension would be reckoned as qualifying service for the grant of higher grade to non-gazetted officers and gazetted officers with effect from 1.7.1979 and 1.7.1988 respectively. By Ext.P4 order, it was made clear that with effect from 1.3.1992 the above benefit of counting war/military service for the grant of higher grade can be availed only once. The intention of the Government while laying down the conditions for the grant of the higher grade by counting war/military service is quite clear, i.e., the benefit of the military service can be reckoned only for the grant of one higher grade."

We agree with the above views of the learned Single Judge that when concessions having financial implications are granted by the Government, widening the scope of such concessions by judicial interpretation would invite unexpected burden on the public exchequer. Time bound higher grade is not a condition of service guaranteed by statutory rules but a concession extended to employees who are stagnating in a particular post for want of regular promotion.

4. As far as the facts of this case are concerned, petitioner joined the Government service only on 18.2.1984. In view of the Government Order of 1985, time bound higher grade promotion was granted with effect from 16.9.1985. Taking the military service, that is, after $1^1/_2$ years of entry in service, she got first higher grade promotion as her military service was from 16.12.1971 to 27.8.1982, that is, 10 years and 8 months. She will get the second grade promotion only after 10 years, that is, on 16.9.1995 only and her claim that she is entitled to get second grade promotion on completion of 20 years reckoning the military service from 16.12.1971 to 27.8.1982 is not contemplated by the Government Orders. If the petitioner avails the second higher grade only after 20 years of total service from the entry point, she will get the same only on 18.2.2005. But the earliest date, the petitioner can claim the second grade benefit as 10 years after the first grade promotion, that is on 16.9.1995. That benefit was not taken away. Ten years of service is taken from 16.9.1995, the

date when first grade promotion was granted reckoning the military service also. If she gets second grade promotion after 10 years of service after first grade promotion, there is no stagnation. Therefore the observations of the Division Bench in ***Kerala v. Sreedharan (2004 (1) KLT 398)*** has not laid down the correct legal position. The prior military service can be reckoned only for granting the first grade promotion. It cannot be reckoned for granting subsequent grade promotions. Hence we overrule the dicta in Sreedharan's case. The relevant Government orders and circulars were not produced before the Division Bench that lead to the above findings.

It was contended that petitioner is a retired nurse and the interpretation of the Government Orders was doubted by the Government itself. Earlier two Division Benches of this Court also interpreted the matter in favour of the petitioner. Considering the above facts, we are of the opinion that if any amount was already given to the petitioner on the basis of the dicta in Sreedharan's case, it shall not be recovered in the

special facts of this case without this being treated as a precedent. But any future benefits need be paid to her as per the ratio of this decision taking Exts.P5 and P7 as valid. If retiral benefits are not given to the petitioner pending decision in this case, it should be disbursed to her without any delay according to law. Even though retirement benefits also can be recalculated on the basis of Exts.P5 and P7, the amount already paid shall not be taken back. Judgment of the Learned Single Judge is set aside. With the above observations this appeal is allowed.

J.B.KOSHY, JUDGE

A.K.BASHEER, JUDGE

K.P.BALACHANDRAN, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

M.F.A.NO. OF 2006 ()

J U D G M E N T

1st December, 2007